



DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Part 212

[CIS No. 2696-21; DHS Docket No. USCIS-2021-0013]

RIN 1615-AC74

Public Charge Ground of Inadmissibility

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Advance notice of proposed rulemaking and notice of virtual public listening sessions.

SUMMARY: Under provisions of the Immigration and Nationality Act, the Department of Homeland Security (DHS) administers the public charge ground of inadmissibility as it pertains to applicants for admission and adjustment of status. DHS is publishing this advance notice of proposed rulemaking (ANPRM) to seek broad public feedback on the public charge ground of inadmissibility that will inform its development of a future regulatory proposal. DHS intends to propose a rule that will be fully consistent with law; that will reflect empirical evidence to the extent relevant and available; that will be clear, fair, and comprehensible for officers as well as for noncitizens and their families; that will lead to fair and consistent adjudications and thus avoid unequal treatment of the similarly situated; and that will not otherwise unduly impose barriers on noncitizens seeking admission to or adjustment of status in the United States. DHS also intends to ensure that its regulatory proposal does not cause undue fear among immigrant communities or present other obstacles to immigrants and their families accessing public services available to them, particularly in light of the COVID-19 pandemic and the resulting long-term public health and economic impacts in the United States. DHS welcomes input from individuals, organizations, government entities and agencies, and all other interested members of the public.

Comments will be most helpful if they clearly identify the questions to which they are responding, offer concrete proposals, and/or articulate support or opposition to current or prior DHS public charge policies, and cite to relevant laws, regulations, data, and/or studies. DHS is also providing notice of public virtual listening sessions on the public charge ground of inadmissibility and this ANPRM.

DATES: Written comments and related material must be submitted on or before [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Listening Sessions Dates and Themes: The virtual public listening sessions (which will be opportunities for the public to speak directly to DHS on the questions raised in this ANPRM) will be held on—

Date/Time	Theme
September 14, 2021 at 2:00 pm ET	Listening Session for the General Public
October 5, 2021 at 2:00 pm ET	State, Territorial, Local, and Tribal Benefits Granting Agencies and Nonprofit Organizations Only

Registration to comment date: For an opportunity to provide oral comments during the virtual public listening sessions, you must register by 12:00 p.m. (noon) Eastern Time (ET) on the Sunday before the listening session in question. For registration instructions, see the **Public Participation** section below.

ADDRESSES: You may submit comments on this ANPRM, identified by DHS Docket No. USCIS-2021-0013, through the Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including e-mails or letters sent to DHS or U.S. Citizenship and Immigration Services (USCIS) officials, will not be considered comments on the ANPRM and may not be considered by DHS in informing future

rulemaking. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS is not accepting mailed comments. If you cannot submit your comment by using <https://www.regulations.gov>, please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721-3000 for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Andrew Parker, Branch Chief, Residence and Admissibility Branch, Residence and Naturalization Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, DHS, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone (240) 721-3000 (this is not a toll-free number).

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Table of Abbreviations

AFM – USCIS Adjudicator’s Field Manual

ANPRM – Advance Notice of Proposed Rulemaking

BIA – Board of Immigration Appeals

CFR – Code of Federal Regulations

DHS – Department of Homeland Security

DOS – Department of State

DOJ – Department of Justice

FAM – Department of State Foreign Affairs Manual

HCV – Housing Choice Voucher

HSA – Homeland Security Act

IIRIRA – Illegal Immigration Reform and Immigrant Responsibility Act of 1996

INA – Immigration and Nationality Act

INS – Immigration and Naturalization Service

IRCA – Immigration Reform and Control Act

LPR – Lawful Permanent Resident

NPRM – Notice of Proposed Rulemaking

PRWORA – Personal Responsibility and Work Opportunity Reconciliation Act of 1996

SNAP – Supplemental Nutrition Assistance Program

SSI – Supplemental Security Income

USCIS – U.S. Citizenship and Immigration Services

I. Public Participation

DHS invites all interested parties to submit written data, views, comments, and

arguments on all aspects of this ANPRM. Comments must be submitted in English, or an English translation must be provided. DHS welcomes comments on any aspects discussed in this ANPRM and has identified in Section “III. Request for Information” of this document the matters on which DHS will find public comments most helpful to its future rulemaking.

Registration for listening sessions: To register and receive information on how to attend the virtual public listening sessions, please go to: <https://www.uscis.gov/outreach/upcoming-national-engagements>.

Instructions for comments: All submissions may be posted, without change, to the Federal eRulemaking Portal at <https://www.regulations.gov>, and may include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at <https://www.regulations.gov>.

Docket: For access to the docket and to read background documents or comments received, go to <https://www.regulations.gov>, referencing DHS Docket No. USCIS-2021-0013. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Background

A. Legal Authority

The authority of the Secretary of Homeland Security (Secretary) for issuing regulations is found in various sections of the Immigration and Nationality Act (INA, 8 U.S.C. 1101 et seq.), and the Homeland Security Act of 2002 (HSA).¹ Section 102 of the HSA, 6 U.S.C. 112, and

¹ See Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq. (Nov. 25, 2002).

section 103 of the INA, 8 U.S.C. 1103, charge the Secretary with the administration and enforcement of the immigration laws of the United States. In addition to establishing the Secretary's general authority for the administration and enforcement of immigration laws, section 103 of the INA, 8 U.S.C. 1103, enumerates various related authorities, including the Secretary's authority to establish such regulations, prescribe such forms of bond, issue such instructions, and perform such other acts as the Secretary deems necessary for carrying out such authority.

Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), provides that an applicant for a visa, admission, or adjustment of status is inadmissible if he or she is likely at any time to become a public charge. The public charge ground of inadmissibility, therefore, applies to anyone applying for a visa to come to the United States temporarily or permanently, for admission to the United States, or for adjustment of status to that of a lawful permanent resident.² Some categories of noncitizens are exempt from the public charge inadmissibility ground, while others may apply for a waiver of the public charge inadmissibility ground.³

The INA does not define the term "public charge." It does, however, specify that when determining whether a noncitizen is likely at any time to become a public charge, consular officers and immigration officers must, at a minimum, consider the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills.⁴ Additionally, section 212(a)(4)(B)(ii) of the INA, 8 U.S.C. 1182(a)(4)(B)(ii), permits the consular officer or the immigration officer to consider any Affidavit of Support Under Section 213A of the INA submitted on the applicant's behalf when determining whether the applicant is likely at any time to become a public charge.⁵ Most noncitizens seeking family-based immigrant visas or

² See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

³ See INA section 245(j), 8 U.S.C. 1255(j); 8 CFR 245.11; INA section 245(h)(2)(B), 8 U.S.C. 1255(h)(2)(B); INA 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A).

⁴ See INA section 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

⁵ When required, the applicant must submit an Affidavit of Support Under Section 213A of the INA (Form I-864 or Form I-864EZ).

adjustment of status, and some noncitizens seeking employment-based immigrant visas or adjustment of status, must submit a sufficient Affidavit of Support Under Section 213A of the INA in order to avoid being found inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).⁶

In general, under section 213 of the INA, 8 U.S.C. 1183, the Secretary has the discretion to admit into the United States a noncitizen who is determined to be inadmissible based only on the public charge ground upon the giving of a suitable and proper bond or undertaking approved by the Secretary.⁷ The purpose of issuing a public charge bond is to ensure that the noncitizen will not become a public charge in the future.⁸ Since the introduction of the Affidavit of Support Under Section 213A of the INA, the use of public charge bonds has decreased, and USCIS does not currently administer a public charge bond process.⁹

Section 235 of the INA, 8 U.S.C. 1225, addresses the inspection of applicants for admission, including admissibility determinations of such applicants.

Section 245 of the INA, 8 U.S.C. 1255, generally establishes eligibility criteria for adjustment of status to that of a lawful permanent resident.

B. Regulatory History

The public charge ground of inadmissibility has been the subject of numerous judicial and administrative decisions, as well as administrative guidance and regulations. On May 26, 1999, soon after enactment of the Illegal Immigration Reform and Immigrant Responsibility Act

⁶ See INA section 212(a)(4)(C), (D), 8 U.S.C. 1182(a)(4)(C), (D).

⁷ See INA section 213, 8 U.S.C. 1183.

⁸ See *Matter of Viado*, 19 I&N Dec. 252 (BIA 1985).

⁹ See Adjudicator's Field Manual (AFM) Ch. 61.1(b), available at <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm61-external.pdf> (last visited June 4, 2021).

of 1996 (IIRIRA), which amended the public charge ground of inadmissibility,¹⁰ INS issued Interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds (1999 Interim Field Guidance).¹¹ This guidance identified how the agency would determine if a person is likely to become a public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), for admission and adjustment of status purposes, and whether a person is deportable as a public charge under section 237(a)(5) of the INA, 8 U.S.C. 1227(a)(5). INS proposed promulgating these policies as regulations in a proposed rule issued on May 26, 1999, but no final rule was issued.¹² The Department of State (DOS) also issued a cable to its consular officers at that time implementing similar guidance for visa adjudications, and similarly updated its Foreign Affairs Manual (FAM).¹³ Until 2019, INS and later, USCIS, followed the 1999 Interim Field Guidance in their adjudications. DOS followed its public charge guidance as set forth in the FAM.¹⁴

In August 2019, DHS issued a final rule titled *Inadmissibility on Public Charge Grounds* (2019 Final Rule).¹⁵ The 2019 Final Rule redefined the term public charge to mean “an alien who receives one or more public benefits, as defined in [the 2019 Final Rule], for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).”¹⁶ It also defined the term public benefit to

¹⁰ Pub. L. 104-208, div. C, 110 Stat 3009-546. DHS notes that a few months after IIRIRA was enacted, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104-193, 11 Stat. 2105, which included a statement of national policy regarding immigration and welfare generally. The statement provides, among other things, that “it continues to be the immigration policy of the United States that aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and the availability of public benefits not constitute an incentive for immigration to the United States.” See 8 U.S.C. 1601.

¹¹ 64 FR 28689 (May 26, 1999). Due to a printing error, the Federal Register version of the field guidance appears to be dated “March 26, 1999” even though the guidance was actually signed May 20, 1999, became effective May 21, 1999 and was published in the Federal Register on May 26, 1999.

¹² See *Inadmissibility and Deportability on Public Charge Grounds*, 64 FR 28676 (May 26, 1999).

¹³ See 9 FAM 40.41.

¹⁴ See 9 FAM 302.8-2(B)(2), Determining “Totality of Circumstances,” (g) Public Charge Bonds, available at <https://fam.state.gov/fam/09fam/09fam030208.html>. Note that on January 3, 2018, DOS amended its FAM guidance, which retained the definitions and framework from the prior guidance, but changed the manner in which DOS evaluated the Affidavit of Support Under Section 213A of the INA as well as how it considered the receipt of non-cash benefits by applicants, sponsors, and family members.

¹⁵ See 84 FR 41292 (Aug. 14, 2019); see also 84 FR 52357 (Oct. 2, 2019) (making corrections). In October 2019, DOS issued a conforming rule. See 84 FR 54996 (Oct. 11, 2019).

¹⁶ See 84 FR 41292 (Aug. 14, 2019).

include cash assistance for income maintenance (other than tax credits), SNAP, most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing.¹⁷ The applicability of some provisions of the 2019 Final Rule was limited in certain ways, including with respect to active duty military members and their spouses and children, and for children in certain contexts.¹⁸

The 2019 Final Rule also established an evidentiary framework for USCIS' consideration of public charge inadmissibility and explained how DHS would interpret the minimum statutory factors for determining whether, "in the opinion of"¹⁹ the officer, a noncitizen is likely at any time to become a public charge. Specifically, for adjustment of status applications before USCIS, DHS created a new Declaration of Self-Sufficiency, Form I-944, that collected information from applicants relevant to the 2019 Final Rule's approach to the statutory factors.²⁰

The 2019 Final Rule also revised DHS regulations governing the Secretary's discretion to accept a public charge bond under section 213 of the INA, 8 U.S.C. 1183, for those seeking adjustment of status.²¹

The 2019 Final Rule was preliminarily enjoined by U.S. district courts in the Southern District of New York, District of Maryland, Northern District of California, Eastern District of

¹⁷ See 84 FR 41292 (Aug. 14, 2019).

¹⁸ See 84 FR 41292 (Aug. 14, 2019). For example, under that rule, public benefits did not include benefits received by a person who, at the time of receipt, filing the application for admission or adjustment of status, or adjudication, was enlisted in the U.S. Armed Forces, serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or benefits received by the spouse or child of such a service member. Moreover, under that rule, public benefits did not include benefits received by children of U.S. citizens whose lawful admission for permanent residence would result in automatic acquisition of U.S. citizenship.

¹⁹ See INA section 212(a)(4)(A), 8 U.S.C. 1182(a)(4)(A).

²⁰ The Declaration of Self-Sufficiency requirement only applied to adjustment of status applicants and not to applicants for admission at a port of entry.

²¹ See 84 FR 41292 (Aug. 14, 2019). The 2019 Final Rule also contained provisions that would render certain nonimmigrants ineligible for extension of stay or change of status if they received one or more public benefits for more than 12 months in the aggregate within any 36-month period since obtaining the nonimmigrant status they sought to extend or change.

Washington, and Northern District of Illinois.²² Following a series of stays of the preliminary injunctions,²³ DHS began applying the Final Rule on February 24, 2020. Since that time, preliminary injunctions against the Final Rule were affirmed by the Second, Seventh, and Ninth Circuit Courts of Appeals.²⁴ On November 2, 2020, the U.S. District Court for the Northern District of Illinois issued a Rule 54(b) judgment vacating the rule on the merits.²⁵ On November 3, 2020, the Seventh Circuit granted an administrative stay of the district court’s judgment and, on November 19, 2020, the Seventh Circuit granted a stay pending appeal. On March 9, 2021, DHS moved to dismiss its appeal before the Seventh Circuit, the Seventh Circuit dismissed the appeal, and the Rule 54(b) judgment went into effect.

As a result of the judgment, DHS ceased to apply the 2019 Final Rule and instead reverted to the policy that was in effect prior to that rule, *i.e.*, the 1999 Interim Field Guidance. DHS also removed the regulatory text that DHS had promulgated in the 2019 Final Rule and that had been vacated by the district court, thereby restoring the regulatory text to appear as it did prior to the 2019 Final Rule’s issuance.²⁶

DHS notes that on February 2, 2021, President Biden issued Executive Order 14012, *Restoring Faith in Our Legal Immigration System and Strengthening Integration and Inclusion Efforts for New Americans*.²⁷ In the Executive Order, the President declared a national policy “to

²² See *City and Cnty. of San Francisco v. USCIS*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019); *Cook County, Ill. v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019); *Casa de Md. v. Trump*, 414 F. Supp. 3d 760 (D. Md. 2019) *Make the Road New York v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019); *Wash. v. DHS*, 408 F. Supp. 3d 1191 (E.D. Wash. 2019).

²³ See *Wolf v. Cook County*, 140 S. Ct. 681 (2020) (staying preliminary injunction from the Northern District of Illinois); *DHS v. New York*, 140 S. Ct. 599 (2020) (staying preliminary injunctions from the Southern District of New York); *City and Cnty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019) (staying preliminary injunctions from the Eastern District of Washington and Northern District of California); *CASA de Md. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019) (staying preliminary injunction from the District of Maryland).

²⁴ See *New York v. DHS*, 969 F.3d 42 (2d Cir. 2020); *Cook County, Ill. v. Wolf*, 962 F.3d 208 (7th Cir. 2020); *City and Cnty. of San Francisco v. USCIS*, 981 F.3d 742 (9th Cir. 2020); see also *Casa de Md. v. Trump*, 981 F.3d 311 (4th Cir. 2020) (granting *en banc* review and vacating a panel opinion that had reversed a preliminary injunction). In July 2020, the Southern District of New York issued a second preliminary injunction against the Final Rule for reasons related to the COVID-19 pandemic, which the Second Circuit later stayed. See *New York v. DHS*, 475 F. Supp. 3d 208 (S.D.N.Y. 2020), *injunction stayed*, 974 F.3d 210 (2d Cir. 2020).

²⁵ See *Cook County, Ill. v. Wolf*, No. 19-C-6334, 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020).

²⁶ 86 FR 14221 (Mar. 15, 2021).

²⁷ 86 FR 8277 (Feb. 5, 2021).

ensure that our laws and policies encourage full participation by immigrants, including refugees, in our civic life; that immigration processes and other benefits are delivered effectively and efficiently; and that the Federal Government eliminates sources of fear and other barriers that prevent immigrants from accessing government services available to them.”²⁸ The President also specifically directed a review of public charge policies by the Secretary of State, the Attorney General, and the Secretary of Homeland Security, in consultation with the heads of relevant agencies.

III. Request for Information

DHS is publishing this ANPRM to seek broad public feedback on the public charge ground of inadmissibility that will inform DHS’s consideration of further rulemaking action. DHS is in the process of preparing a regulatory proposal that will be fully consistent with law; that will reflect empirical evidence to the extent relevant and available; that carefully considers public comments; that will be clear, fair, and comprehensible for officers as well as for noncitizens and their families; that will lead to fair and consistent adjudications and thus avoid unequal treatment of similarly situated individuals; and that will not otherwise unduly impose barriers for noncitizens seeking admission or adjustment of status in the United States.²⁹ DHS also intends to ensure that any regulatory proposal does not unduly interfere with the receipt of public benefits by applicants and their families, particularly in light of the COVID-19 pandemic and the resulting long-term public health and economic impacts in the United States.³⁰

²⁸ 86 FR 8277 (Feb. 5, 2021).

²⁹ See Executive Order 14012 (Restoring Faith in Our Legal Immigration System and Strengthening Integration and Inclusion Efforts for New Americans), 86 FR 8277 (Feb. 5, 2021).

³⁰ See, e.g., International Labor Organization, Food and Agricultural Organization of the United Nations, International Fund for Agricultural Development, and World Health Organization Joint Statement, “Impact of COVID-19 on people’s livelihoods, their health and our food systems” (2020), <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems> (last visited Jul. 14, 2021); Pew Research Center, A Year Into the Pandemic, Long-Term Financial Impact Weighs Heavily on Many Americans (2021), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2021/03/PSD_03.05.21.covid_impact_fullreport.pdf (last visited Jul. 14, 2021); Health Affairs, Spillover Effects of the COVID-19 Pandemic Could Drive Long-Term Health Consequences for Non-COVID-19 Patients (2020), <https://www.healthaffairs.org/doi/10.1377/hblog20201020.566558/full/> (last visited Jul. 14, 2021).

DHS welcomes and will carefully consider public input on all aspects of public charge inadmissibility in its ongoing rulemaking efforts in this area, consistent with its broad authority to administer the U.S. immigration system. In addition to inviting written comments, DHS is providing the public with the opportunity to participate in virtual public listening sessions. For information about those sessions, please see the Public Participation and Dates sections of this document.

A. Purpose and Definition of Public Charge

1. Background

As noted, the INA does not define the term “public charge,” but specifies that consular and immigration officers must, at a minimum, consider the noncitizen’s age; health; family status; assets, resources, and financial status; and education and skills when making public charge inadmissibility determinations.³¹

As part of this rulemaking, DHS expects to codify a definition of public charge that (1) is consistent with law; (2) is easily understood; (3) is straightforward to apply in a fair, consistent, and predictable manner; (4) reflects consideration of relevant national policies; and (5) will not unduly impose barriers for noncitizens seeking admission or adjustment of status in the United States.

2. Questions for the Public

DHS welcomes public comment on all aspects of the topic described above, and would particularly benefit from commenters addressing one or more of the following questions, including the reasoning, data, and information behind their comments:

1. How should DHS define the term “public charge”?

³¹ See INA section 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

2. What data or evidence is available and relevant to how DHS should define the term “public charge”?
3. How might DHS define the term “public charge”, or otherwise draft its rule, so as to minimize confusion and uncertainty that could lead otherwise-eligible individuals to forgo the receipt of public benefits?
4. What national policies, including the policies referenced throughout this ANPRM, policies related to controlling paperwork burdens on the public, and policies related to promoting the public health and general well-being, should DHS consider when defining the term “public charge” and administering the statute more generally?
5. What potentially disproportionate negative impacts on underserved communities (e.g., people of color, persons with disabilities) could arise from the definition of “public charge” and how could DHS avoid or mitigate them?
6. What tools and approaches can DHS use to ensure that future rulemaking is appropriately informed by available evidence?³²

B. Prospective Nature of the Public Charge Inadmissibility Determination

1. Background

As noted in the 1999 Interim Field Guidance, the existing test for adjudicating public charge inadmissibility “has been developed in several Service, BIA, and Attorney General decisions and has been codified in the Service regulations implementing the legalization

³² Consistent with Executive Orders 12866 and 13563, DHS is committed to evidence-based policymaking. DHS is aware of at least one recent attempt to use available data and machine-learning tools to estimate the probability of a noncitizen becoming a public charge (as that term was defined under the 2019 Final Rule). See Mitra Akhtari et al, *Estimating the Likelihood of Becoming a “Public Charge,”* N.Y.U. J. Legis. & Pub. Pol’y Quorum (Aug. 2, 2021), <https://nyujlpp.org/quorum/estimating-the-empirical-likelihood-of-becoming-a-public-charge/> (accessed Aug. 4, 2021). DHS welcomes comments on the approach described in that paper; alternative approaches that may appropriately leverage available evidence and tools; and the potential implications of such approaches for this rulemaking.

provisions of the Immigration Reform and Control Act of 1986. These decisions and regulations, and section 212(a)(4) itself, create a ‘totality of the circumstances’ test.”³³ The vacated 2019 Final Rule also required that the public charge inadmissibility determination “be based on the totality of the alien’s circumstances by weighing all factors that are relevant to whether the alien is more likely than not at any time in the future to receive one or more public benefits.”³⁴ Under the vacated 2019 Final Rule, at a minimum, officers were to consider all of the mandatory factors set forth in the statute, as well as the noncitizen’s prospective immigration status and expected period of admission, and (where applicable) a sufficient Affidavit of Support Under Section 213A of the INA.³⁵

Through a future rulemaking, DHS may seek to clarify how officers should consider a noncitizen’s past and present circumstances in determining the likelihood that they will become a public charge at any time in the future.

2. Questions for the Public

DHS welcomes public comment on all aspects of the topic described above, but would particularly benefit from commenters addressing one or more of the following questions, including the reasoning, data, and information that inform their comments:

1. To the extent that DHS considers a noncitizen’s past or current receipt of public benefits, for what period of time before the public charge inadmissibility determination should DHS consider the noncitizen’s receipt of public benefits? Why is that time period relevant?

C. Statutory Factors

1. Background

³³ See 64 FR 28689, 28690 (May 26, 1999).

³⁴ See 84 FR 41292, 41502 (Aug. 14, 2019).

³⁵ See 84 FR 41292, 41423 (Aug. 14, 2019).

Section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), states that DHS must, at a minimum, consider the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills.³⁶ DHS may also consider any Affidavit of Support under Section 213A of the INA, which is described below in Section D.³⁷

In the 1999 Interim Field Guidance, the former INS noted that officers must consider the mandatory statutory factors, as well as any Affidavit of Support Under Section 213A of the INA submitted, and that "[e]very denial order based on public charge must reflect consideration of each of these factors and specifically articulate the reasons for the officer's determination."³⁸ The guidance suggested that factors would be either positive or negative,³⁹ but did not explain what evidence officers should consider in evaluating these factors listed in section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), or the weight to be given to a particular factor, in the totality of the circumstances.⁴⁰

In the vacated 2019 Final Rule, DHS also required officers to consider the mandatory statutory factors, as well as a sufficient Affidavit of Support Under Section 213A of the INA, if submitted, in the totality of the circumstances, when assessing an applicant's likelihood of becoming a public charge at any time in the future.⁴¹ That rule provided certain standards for officers to use in assessing each factor and also identified evidence that USCIS deemed relevant for the consideration of these factors.⁴²

³⁶ See INA section 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

³⁷ See INA section 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

³⁸ See 64 FR 28689, 28689-90 (May 26, 1999).

³⁹ See 64 FR 28689, 28689-90 (May 26, 1999).

⁴⁰ See 64 FR 28689, 28689-90 (May 26, 1999). As explained more fully elsewhere in this document, the 1999 Interim Field Guidance included consideration of the past and present receipt of cash assistance for income maintenance and noted that less weight would be assigned the longer ago the benefits were received. 64 FR at 28690. The 1999 Interim Field Guidance also noted that applicants who received cash assistance for income maintenance could overcome such receipt by being employed full-time or having a sufficient Affidavit of Support Under Section 213A of the INA. 64 FR at 28690.

⁴¹ See 84 FR 41307. As explained more fully elsewhere, the rule also required consideration of an additional factor not referenced in the statute.

⁴² See 84 FR 41292 (Aug. 14, 2019).

Through a future rulemaking, DHS may seek to clarify how officers should consider the statutory factors in making a public charge inadmissibility determination, as well as any other factors relevant to assessing an applicant's likelihood of becoming a public charge at any time.

2. Questions for the Public

DHS welcomes public comment on the topic described above, but would particularly benefit from commenters addressing one or more of the following questions including the reasoning, data, and information behind their comments:

1. Which factors (whether statutory factors or any other relevant factors identified by the commenter) are most predictive of whether a noncitizen is likely (or is not likely) to become a public charge? To the extent that data exist on this question, how can DHS use such data to improve public charge policymaking and adjudication?
2. How can DHS address the potential for perceived or actual unfairness or discrimination in public charge inadmissibility adjudications, whether due to cognitive, racial, or other biases; arbitrariness; variations in outcomes across cases with similar facts; or other reasons?
3. What kinds of tools (in regulation or policy guidance) could DHS provide to the public and adjudicators to make the totality of the circumstances determination more predictable and less subject to variation in different cases presenting similar facts?
4. Should DHS give any more or less consideration to any one or more of the statutory factors, the Affidavit of Support Under Section 213A of the INA, or any additional factors DHS may add through the rulemaking process in a public charge inadmissibility determination?

5. In the adjustment of status context, how should DHS request the necessary information to consider the mandatory statutory factors for each adjudication, without imposing undue paperwork burdens on the public and adjudicators?
 - a. **Age**
 1. How should an applicant's age be considered as part of the public charge inadmissibility determination?
 - b. **Health**
 1. How should DHS define health for the purposes of a public charge inadmissibility determination?
 2. Should DHS consider disabilities and/or chronic health conditions as part of the health factor? If yes, how should DHS consider these conditions and why?
 3. How should the Rehabilitation Act of 1973's prohibition of discrimination on the basis of disability be considered in DHS's analysis of the health factor?⁴³
 4. How should DHS consider the Report of Medical Examination and Vaccination Record, Form I-693, as part of the health factor?
 5. Should DHS account for social determinants of health to avoid unintended disparate impacts on historically disadvantaged groups? If yes, how should DHS consider this limited access and why?
 - c. **Family Status**
 1. How should DHS define and consider family status for the purposes of a public charge inadmissibility determination?

⁴³ Note that under Executive Order 12250, DOJ is charged with coordinating the implementation and enforcement by Executive agencies of Section 504 of the Rehabilitation Act.

2. How should an applicant's household size be considered as part of the family status factor? What definition of an applicant's household size should DHS use for the public charge inadmissibility determination?

d. Assets, Resources, and Financial Status

1. What types of assets and resources are relevant to a public charge inadmissibility determination?
2. Whose assets and resources should be considered as part of this factor?
3. How should DHS define financial status for the purposes of a public charge inadmissibility determination?
4. How should DHS address the challenges faced by those not served by a bank or similar financial institution in demonstrating their assets, resources, and financial status?
5. Should DHS consider an applicant's financial obligations (such as child or spousal support), debt, or bankruptcy in a public charge inadmissibility determination? If yes, how should DHS consider an applicant's debt, bankruptcy, or financial obligations when evaluating an applicant's financial status and why?
6. Should DHS address its assessment of the relationship between the applicant's assets, resources, and financial status in the context of his or her particular circumstances (e.g., costs of living in the applicant's geographic location) in its rulemaking? If yes, how so?
7. What data sources and criteria should DHS use to assess the sufficiency of the applicant's assets, resources, and financial status?
8. Should DHS consider the varied economic opportunities afforded to applicants to avoid unintended disparate impacts? If yes, how should DHS consider these limited opportunities and why?

e. Education and Skills

1. How should DHS consider an applicant's education and skills in making a public charge inadmissibility determination?
2. What education and skills should DHS consider in making a public charge inadmissibility determination?
3. Should DHS consider the varied access to educational opportunities afforded to applicants to avoid disparate impacts? If yes, how should DHS consider this limited access and why?

D. Affidavit of Support Under Section 213A of the INA

1. Background

Most family-based and some employment-based applicants for adjustment of status are required to submit an Affidavit of Support Under Section 213A of the INA, Form I-864 or Form I-864EZ, executed by a sponsor, which is usually the U.S. citizen or LPR who filed the immigrant visa petition on the adjustment applicant's behalf.⁴⁴ The absence of a sufficient Affidavit of Support Under Section 213A of the INA, where required, will result in a finding of inadmissibility under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), without consideration of the mandatory statutory factors.⁴⁵ Under section 212(a)(4)(B)(ii) of the INA, 8 U.S.C. 1182(a)(4)(B)(ii), DHS may consider a sufficient Affidavit of Support Under Section 213A of the INA⁴⁶ for the purposes of determining the applicant's likelihood of becoming a public charge at any time.

The 1999 Interim Field Guidance did not specifically address how officers should consider the Affidavit of Support Under Section 213A of the INA for the purposes of the totality of the

⁴⁴ See INA sections 212(a)(4)(C), (D) and 213A, 8 U.S.C. 1182(a)(4)(C) and (D).

⁴⁵ See INA sections 212(a)(4)(C), (D) and 213A, 8 U.S.C. 1182(a)(4)(C) and (D).

⁴⁶ A sufficient Affidavit of Support Under Section 213A of the INA is one in which the sponsor has demonstrated that he or she has enough income and/or assets to maintain the sponsored noncitizen and the rest of the sponsor's household at 125% of the Federal Poverty Guidelines (FPG) for that household size (or at 100 percent of the FPG if the sponsor is active duty in the U.S. Armed Forces or U.S. Coast Guard). See INA section 213A, 8 U.S.C. 1183a.

circumstances determination as set forth in section 212(a)(4)(B)(ii) of the INA, 8 U.S.C. 1182(a)(4)(B)(ii), focusing instead on how a sponsor's receipt of means-tested public benefits was considered for the purposes of determining the sufficiency of the affidavit.⁴⁷ However, in the vacated 2019 Final Rule, DHS described how officers would consider a sufficient Affidavit of Support Under Section 213A of the INA.⁴⁸ In that rule, DHS provided that adjudicators would consider the likelihood that the sponsor would actually provide the statutorily required amount of financial support to the noncitizen as part of the totality of the circumstances determination.⁴⁹

In a future rulemaking, DHS may seek to address the manner in which a sufficient Affidavit of Support Under Section 213A of the INA is considered as part of a public charge inadmissibility determination.

2. Questions for the Public

DHS welcomes public comment on all aspects of the topic described above, but would particularly benefit from commenters addressing one or more of the following questions, including the reasoning, data, and information behind their comments:

1. How should DHS consider a sufficient Affidavit of Support Under Section 213A of the INA in the public charge inadmissibility determination?
2. What weight should DHS give to a sufficient Affidavit of Support Under Section 213A of the INA in comparison to the mandatory statutory factors in the public charge inadmissibility determination?

E. Other Factors to Consider

1. Background

⁴⁷ See 64 FR 28689, 28693 (May 26, 1999).

⁴⁸ See 84 FR 41292, 41440 (Aug. 14, 2019).

⁴⁹ See 84 FR 41292, 41504 (Aug. 14, 2019).

Section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), states that DHS must, at minimum, consider the individual’s age; health; family status; assets, resources, and financial status; and education and skills. DHS may also consider any Affidavit of Support Under Section 213A of the INA, which is described above in Section D. The statute’s inclusion of the words “at minimum” suggests that other factors, beyond those listed and the Affidavit of Support Under Section 213A of the INA, may be considered when determining whether an individual is likely to become a public charge.

While the 1999 Interim Field Guidance suggests that there are other factors besides the mandatory factors and the Affidavit of Support Under Section 213A of the INA that are considered in the totality of the circumstances, that guidance did not specify or explain those other factors.⁵⁰ The vacated 2019 Final Rule, however, promulgated one additional factor apart from the factors set forth in section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B) – the noncitizen’s prospective immigration status and expected period of admission.⁵¹

In a future rulemaking, DHS may seek to address whether there are factors other than those identified in section 212(a)(4)(B) of the INA, 8 U.S.C. 1184(a)(4)(B), that should be considered as part of a public charge inadmissibility determination.

2. Questions for the Public

DHS welcomes public comment on all aspects of the topic described above, but would particularly benefit from commenters addressing the following questions including the reasoning, data, and information behind their comments:

1. What other factors, if any, should DHS consider as part of the public charge inadmissibility determination and why?

⁵⁰ See 64 FR 28689, 28690 (May 26, 1999).

⁵¹ See 84 FR 41292, 41423 (Aug. 14, 2019).

2. How, if at all, should DHS account for the fact that there are differences in the duration of time noncitizens are authorized to stay in the United States, and that many noncitizens subject to the public charge ground of inadmissibility are expected to remain in the United States for only a brief period of time?
3. What data or evidence is available and relevant to the question above?

F. Public Benefits Considered

1. Background

The former INS, in the 1999 Interim Field Guidance, recognized a link between public charge and the receipt of public benefits by defining public charge in terms of primary dependence on the government for subsistence, and in directing officers to consider the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense.⁵² In tying the receipt of cash assistance for income maintenance to public charge, the former INS believed it would be able to “identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests.”⁵³ The former INS’s focus on cash assistance for income maintenance reflected the determination that receipt of benefits under these programs was more reflective of poverty or dependence, while such was not the case for most non-cash benefits, which (with the exception of institutionalization for long-term care at government expense) were not considered.⁵⁴ Finally, the former INS also tried to address the negative impacts on public health and general welfare caused by individuals forgoing the receipt of such non-cash benefits to avoid negative immigration consequences.⁵⁵

⁵² See 64 FR 28689, 28692 (May 26, 1999).

⁵³ See 64 FR 28689, 28692 (May 26, 1999).

⁵⁴ See 64 FR 28689, 28692 (May 26, 1999).

⁵⁵ See 64 FR 28689, 28692 (May 26, 1999).

In the vacated 2019 Final Rule, DHS also recognized a link between public charge and receipt of public benefits, but determined “that neither the wording of section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), nor case law examining public charge inadmissibility, mandates the ‘primarily dependent’ standard [set forth in the 1999 Interim Field Guidance]. . . .”⁵⁶ Emphasizing the policy statements contained in PRWORA,⁵⁷ the vacated 2019 Final Rule expanded the types of public benefits considered as part of a public charge inadmissibility determination to include not only public cash assistance for income maintenance but also certain designated public non-cash benefits.⁵⁸

In a future rulemaking, DHS may seek to clarify whether and which public benefits should be considered as part of a public charge inadmissibility determination.

2. Questions for the Public

DHS welcomes public comment on all aspects of the topic discussed above, but would particularly benefit from commenters addressing one or more of the following questions including the reasoning, data, and information behind their comments:

1. Should DHS consider the receipt of public benefits (past and/or current) in the public charge inadmissibility determination? If yes, how should DHS consider the receipt of public benefits and why?
2. Which public benefits should be considered as part of a public charge inadmissibility determination?
3. Which public benefits, if any, should not be considered as part of a public charge inadmissibility determination?
4. How should DHS address the possibility that individuals who are eligible for public benefits, including U.S. citizen relatives of noncitizens, would forgo the receipt of those

⁵⁶ See 84 FR 41292, 41349 (Aug. 14, 2019).

⁵⁷ See 8 U.S.C. 1601.

⁵⁸ See 84 FR 41292, 41439 (Aug. 14, 2019).

benefits as a result of DHS's consideration of certain public benefits in the public charge inadmissibility determination? What data and information should DHS consider about the direct and indirect effects of past public charge policies in this regard?

G. Previous Rulemaking Efforts

1. Background

DHS and its predecessor, INS, engaged in two previous rulemaking efforts as discussed in greater detail above in Part II, Section C. On May 26, 1999, INS issued a NPRM, which proposed how the agency would determine if a noncitizen is likely at any time to become a public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a), for admission and adjustment of status purposes, and whether a noncitizen in and admitted to the United States has become a public charge within 5 years after the date of entry for causes not affirmatively shown to have arisen since entry under section 237(a)(5) of the INA, 8 U.S.C. 1227(a)(5).⁵⁹ That NPRM, and the related 1999 Interim Field Guidance, provided a definition for public charge, specified the public benefits that would and would not be considered as part of a public charge determination, established a prospective totality of the circumstances framework that considered the factors set forth in section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), and clarified how the Affidavit of Support Under Section 213A of the INA is used. INS and later DHS never finalized the 1999 NPRM.

On August 14, 2019, DHS issued a final rule addressing the public charge ground of inadmissibility.⁶⁰ The rule provided a new definition for public charge; specified the public benefits that would be considered as part of a public charge inadmissibility determination; established a prospective totality of the circumstances framework that required consideration of

⁵⁹ See *Inadmissibility and Deportability on Public Charge Grounds*, 64 FR 28676 (May 26, 1999).

⁶⁰ See 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction*, 84 FR 52357 (Oct. 2, 2019).

all of the factors set forth in section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), as well as one additional factor; specified the standards and evidence that would be considered in the public charge inadmissibility determination; created a new Form I-944 for public charge inadmissibility determinations in the adjustment of status context; and changed the regulations for public charge bonds.⁶¹

2. Questions for the Public

DHS welcomes public comment on all aspects of the topic described above, but would particularly benefit from commenters addressing one or more of the following questions including the reasoning, data, and information behind their comments:

1. What aspects of the 1999 Interim Field Guidance, if any, should be included in a future public charge inadmissibility rulemaking and why?
2. What aspects of the 1999 NPRM, if any, should be included in a future public charge inadmissibility rulemaking and why?
3. What aspects of the vacated 2019 Final Rule, if any, should be included in a future public charge inadmissibility rulemaking and why?
4. What data are available to estimate any potential direct and indirect effects, economic or otherwise, of the public charge ground of inadmissibility, the 1999 Interim Field Guidance, or the vacated 2019 Final Rule? For instance, what data are available to estimate any potential direct and indirect effects, economic or otherwise, on individuals, social service organizations, hospitals, businesses, and other persons and entities?

H. Bond and Bond Procedures

⁶¹ See 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction*, 84 FR 52357 (Oct. 2, 2019).

1. Background

If a noncitizen is determined to be inadmissible based on the public charge ground, but is otherwise admissible, the person may be admitted in the discretion of the Secretary of Homeland Security upon the giving of a suitable and proper bond under section 213 of the INA, 8 U.S.C. 1183. That section authorizes the Secretary to establish the amount and conditions of such bond. Regulations implementing the public charge bond were promulgated in 1964 and 1966,⁶² and are currently found at 8 CFR 103.6 and 8 CFR 213.1.

The 1999 Interim Field Guidance noted that the agency had the discretionary authority to offer public charge bonds, but did not otherwise explain the manner in which the agency would exercise that discretion.⁶³ In the vacated 2019 Final Rule, DHS established a framework to offer public charge bonds under section 213 of the INA, 8 U.S.C. 1183, to adjustment of status applicants inadmissible only on the public charge ground, which included the minimum bond amount, conditions under which a bond was breached, and when a public charge bond would be cancelled.⁶⁴

In a future rulemaking, DHS may seek to establish a public charge bond process.

2. Questions for the Public

DHS welcomes public comment on all aspects of the topic described above, but would particularly benefit from commenters addressing one or more of the following questions including the reasoning, data, and information behind their comments:

⁶² See *Miscellaneous Amendments to Chapter*, 29 FR 10579 (July 30, 1964); *Miscellaneous Edits to Chapter*, 31 FR 11713 (Sept. 7, 1966).

⁶³ See 64 FR 28689, 28693 (May 26, 1999).

⁶⁴ See 84 FR 41292, 41299 (Aug. 14, 2019).

1. What standard should DHS use to determine whether to exercise its discretion and authorize a noncitizen inadmissible only under the public charge ground to submit a public charge bond?
2. Should DHS establish a minimum bond amount? If yes, how should DHS establish that minimum bond amount and how should DHS adjust that minimum bond amount over time?
3. What factors should DHS consider in establishing a bond amount for a particular inadmissible noncitizen?
4. Under what circumstances should DHS consider a public charge bond breached?
5. Under what circumstances should DHS consider a public charge bond cancelled?

I. Specific Questions for State, Territorial, Local, and Tribal Benefit Granting Agencies and Nonprofit Organizations

1. Background

DHS acknowledges that benefit granting agencies and nonprofit organizations may have valuable information and data regarding the receipt of public benefits and how benefit use intersects with the public charge ground of inadmissibility. DHS intends to formally consult with relevant Federal agencies, including benefits granting agencies, in connection with future rulemaking actions addressing the public charge ground of inadmissibility. As part of this ANPRM, DHS is specifically seeking feedback from state, territorial, local, and tribal benefit granting agencies, as well as nonprofit organizations.

2. Questions for State, Territorial, Local, and Tribal Benefit Granting Agencies and Nonprofit Organizations

DHS welcomes public comment on all aspects of the topic described above, but would particularly benefit from commenters addressing one or more of the following questions including the reasoning, data, and information behind their comments:

1. What costs, if any, has your agency or organization incurred in order to implement changes in public charge policy, such as revising enrollment procedures and public-facing materials? Please provide relevant data.
2. What costs, if any, has your agency or organization incurred as a result of reduction in enrollment, or disenrollment in public benefits programs generally? Please provide relevant data.
3. What costs, if any, has your agency or organization incurred as a result of disenrollment or reduction in enrollment in public benefits programs caused by the public charge ground of inadmissibility, the 1999 Interim Field Guidance, or the vacated 2019 Final Rule? Please provide relevant data.
4. With respect to the specific types of public benefits overseen by your agency, under what circumstances is the receipt of such benefits relevant, if at all, to assessing whether or not an individual is likely at any time to become a public charge?
5. What, if any, specific concerns does your agency or organization have about how DHS applies the public charge ground of inadmissibility and how should DHS address those concerns?
6. What data does your agency or organization have that can be shared to demonstrate any potential impact of the public charge ground of inadmissibility, the 1999 Interim Field Guidance, or the vacated 2019 Final Rule on applications for or disenrollment from public benefits by individuals who are eligible for such benefits?

7. What information, data, or studies does your agency or organization have that can be shared that would help DHS identify factors or patterns of benefit use (e.g., duration, frequency, or extent of benefits use) that suggest whether and to what extent individuals would be likely to use public benefits in the future?
8. How should DHS reduce the possibility that individuals who are eligible for public benefits overseen by your agency would decide to forgo the receipt of those benefits out of concern that receipt of such benefits will make them (or a family member or household member) inadmissible on public charge grounds, even if receipt of such a benefit would not be considered by DHS in a public charge determination, or would not be a decisive factor in a public charge inadmissibility determination?

Alejandro N. Mayorkas

Secretary of Homeland Security.